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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

Supreme Court No. R-15-0003

**1) PETITION TO AMEND RULE
32(c)(9), ARIZONA RULES OF
SUPREME COURT; AND**

**2) CREATE A TASK FORCE TO
EXAMINE STATE BAR'S *KELLER*
COMPLIANCE**

**COMMENT OF
THE STATE BAR OF ARIZONA**

The State Bar of Arizona respectfully requests that the Court reject Peter J. Stutsman's rule-change petition, which appears to have three main themes.

First, the petition proposes to dramatically change Arizona's mandatory-bar structure based on Petitioner's unfounded belief that the State Bar does not comply with *Keller v. State Bar of California*, 496 U.S. 1 (1990). However, as discussed further below, the State Bar follows a "*Keller* pure" policy, which means that it not only complies with *Keller*'s requirements, but it goes further: it does not use mandatory membership dues to fund activities of a political or ideological nature that are not reasonably related to its core functions. It also has a constitutionally appropriate mechanism by which members may object to non-*Keller* expenditures.

1 Second, the petition appears to argue for unreasonably restricting the State
2 Bar's ability to engage in actions that *Keller* clearly allows, such as advocating
3 against legislation affecting lawyer regulation and discipline or even conducting
4 normal business operations, such as purchasing an office building.

5 Finally, the petition attempts to argue for lower dues, both in general and for
6 inactive members specifically. In effect, the petition wants the Court to tell Arizona
7 lawyers they do not need to financially support programs that help them, their fellow
8 lawyers or the legal profession in general. The State Bar stands by its mission to
9 serve and protect the public by enhancing Arizona's legal profession, and believes
10 that all State Bar members, by virtue of their admission to the Bar, are obligated to
11 support that mission, regardless of their individual affection for or use of particular
12 Bar services and activities.

13 **I. Contrary to the petition's broad assertions, the State Bar complies**
14 **strictly with its "*Keller*-pure" policy and believes in being**
15 **transparent with its members.**

16 As a mandatory membership organization, the State Bar adheres strictly to a
17 "*Keller* pure" approach to using mandatory bar dues. This means that it does not use
18 membership dues to fund activities of a political ideological nature that are not
19 reasonably related to its core functions.

20 *Keller* concluded that a unified or mandatory bar association only may
21 constitutionally fund, out of mandatory fees, activities "germane" to goals of
22 regulating the legal profession and improving the quality of legal services. A
23 mandatory bar association may not fund activities, however, of an ideological nature
24 that fall outside of these areas. The test is "whether the challenged expenditures are
25 necessarily or reasonably incurred for the purpose of regulating the legal profession
or 'improving the quality of the legal service available to the people of the State.'"

1 496 U.S. at 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality
2 opinion).

3 Petitioner relies on old union and pre-*Keller* cases to argue that the State Bar
4 has failed to meet *Keller's* requirements. *Keller's* progeny, however, recognize a
5 *Keller*-pure approach, thus avoiding many of the union and pre-*Keller* case
6 requirements. See, e.g., *Schneider vs. Colegio*, 917 F.2d 620 (1st Cir. 1991); *Gibson*
7 *vs. Florida State Bar*, 906 F. 2d 624 (11th Cir. 1990); *The Florida Bar vs. Frankel*,
8 581 So.2d 1294 (Fla. 1991).

9 In *Gibson*, decided six weeks after *Keller*, the Eleventh Circuit considered
10 whether the Florida Bar violated the First and Fourteenth Amendments by engaging
11 in political lobbying and adopting a rebate system by which members who could
12 object to the expenditure of mandatory bar dues. The Florida Bar argued that it was
13 "*Keller* pure," meaning that it complied with *Keller* by not being involved in any
14 political or ideological activities unrelated to its core functions. It also argued that
15 by being "*Keller* pure" and then offering its members a constitutional procedure for
16 objecting to the expenditure of their mandatory dues, a court need not concern itself
17 with any specific activity.

18 The *Gibson* court held that the Florida Bar's rebate procedure was acceptable
19 and an advance deduction procedure was not required. It also determined that
20 requiring a dissenting member to object to specific activities rather than allowing
21 him to make a general objection was constitutionally acceptable. Finally, it also
22 determined that a three-member arbitration panel (as the procedure for handling
23 objecting members' dissents) was constitutionally acceptable.

24 Following *Gibson's* lead, the State Bar amended its bylaws in 1994 to adopt
25 a written policy that the organization establish a *Keller*-pure process. The State Bar's

1 bylaws, specifically Article XIII, which deals with political and ideological
2 activities, complies with *Keller's* mandates:

3
4 13.01. Political and Ideological Activities Generally. The State Bar
5 shall not, except as provided herein, use the dues of its members to fund
6 activities of a political or ideological nature that are not reasonably
related to:

- 7 (A) the regulation and discipline of attorneys;
8 (B) matters relating to the improvement of the functioning of the
justice system;
9 (C) increasing the availability of legal services to the public;
10 (D) regulation of attorney trust accounts;
11 (E) the education, ethics, competence, integrity, and regulation
of the legal profession; and
12 (F) any other activity authorized by law.

13 Under its *Keller*-pure approach, the State Bar Board of Governors and staff
14 analyze every issue before the organization takes a position or becomes involved. If
15 the issue would not pass the *Keller* standard, Section 13.01 of Article XIII bars the
16 State Bar from taking a position or using staff time.

17 In addition to Section 13.01, Section 13.02 allows the State Bar to use
18 mandatory dues to review and analyze pending legislation and specifically allows
19 the State Bar to engage in activities to influence legislation that is directly related to
20 a core purpose of a mandatory bar, such as lawyer regulation and improving the
21 quality of legal services to the public:

22 13.02. Activities Intended to Influence the Legislature.

- 23 (A) The State Bar may use the mandatory dues of all members to
24 review and analyze pending legislation.
25

1 (B) The State Bar may use the mandatory dues of all members to
2 provide content-neutral assistance to legislators, provided
that:

3 (1) a legislator requests the assistance;

4 (2) the Board or its designee approves the request in a letter
to the legislator stating that providing technical
5 assistance does not imply either support for or
opposition to the legislation; and

6 (3) the Board or its designee annually prepares and
7 publishes in the Arizona Attorney a report
summarizing all technical assistance provided during
8 the preceding year.

9 (C) No other activities intended to influence legislation may be
funded with members' mandatory dues, unless the legislation
10 in question is limited to matters within the scope of
permissible activities as described in 13.01.

11
12 Although Petitioner believes the State Bar should be prohibited from
13 attempting to influence legislation at all, even the strictest interpretation of *Keller*
14 permits the State Bar to use mandatory dues to fund activities related to the
15 regulation and discipline of the legal profession in general and of an attorney in
16 particular.

17 **II. The State Bar's procedures for addressing disputes over its**
18 **spending practices comply with *Keller's* requirements.**

19 *Keller* also requires that a mandatory bar association have procedures under
20 which members may challenge expenditures. Contrary to the petition's inaccurate
21 assertion at page 9, the State Bar has a grievance procedure that also is part of its
22 bylaws:

23
24 13.03. Challenges Regarding State Bar Activities

1 (A) A member who claims that the State Bar is funding political or
2 ideological activities in violation of this article may submit a written
challenge to the Executive Director of the State Bar.

3 (1) A written challenge must be made individually and shall
4 include the challenger's name, address, telephone number
5 and bar number. It must also identify the challenged activity
and be signed by the member.

6 (2) Written challenges must be received at the State Bar office in
7 Phoenix on or before February 1 of the year immediately
following the calendar year in which the challenged activity
occurred.

8 (3) Failure to submit a written challenge by the deadline shall
9 constitute a waiver.

10 (4) Submission of a challenge does not relieve a member from
timely paying his or her dues in full.

11 (B) After a written challenge has been received, the Board or its
12 designee shall promptly determine the pro rata amount of the
13 member's dues used to fund the challenged activity and shall place
that amount in an escrow account pending determination of the
merits of the challenge.

14 (C) Upon the expiration of the deadline for receipt of written challenges
15 to the same activity, the Board or its designee shall decide whether
16 to give a pro rata refund to the challengers or to refer the challenge
to arbitration. The Board may elect to have all challenges
consolidated in a single arbitration proceeding.

17 (D) Whenever the Board elects to refer a challenge to arbitration, an
18 impartial arbitrator shall be selected by mutual agreement of all
19 parties within 20 days after the Board gives notice of its election to
20 arbitrate. If all parties cannot agree upon the selection of an
21 arbitrator, the President of the State Bar shall apply to the Chief
22 Judge of the United States District Court for the District of Arizona,
23 who shall select an impartial arbitrator as soon as practicable.
24 Absent a challenge for cause, the selection of an arbitrator by the
25 Chief Judge shall be final. The impartial arbitrator shall determine
whether the funding of a challenged activity complies with the
limitations of this article. If not, the arbitrator shall determine the
pro rata share of dues that is to be refunded, plus the actual interest
rate earned in the escrow account from the date of payment of those
dues to the State Bar.

- 1 (E) The State Bar has the burden of proving by a preponderance of the
2 evidence that the challenged activity is permitted by this article.
3 (F) The necessary cost of the arbitration shall be paid by the State Bar
4 and may be paid from mandatory dues.
5 (G) The decision of the arbitrator shall be final on the question whether
6 the challenged activity violates the limitations on the State Bar's
7 political and ideological activities as set forth in this article and any
8 pro rata share of dues to be refunded.

9 The State Bar publishes its *Keller*-pure policy and the challenge procedure on its
10 website at <http://www.azbar.org/aboutus/governmentrelations/kellerchallenge>.

11 Contrary to the petition's assertions at page 6, *Keller* does not require that all
12 mandatory bars use the three-step procedure suggested in *Teachers vs Hudson*, 475
13 U.S 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). *Keller* left the door open for other
14 procedures. *Keller* simply indicated that the Hudson procedures work and are
15 acceptable, but went on to explicitly leave the door open to other alternative
16 procedures when it stated, "Questions whether one or more alternative procedures
17 would likewise satisfy that obligation are better left for consideration upon a more
18 fully developed record." *Id.* at 17. And, as a result, post-*Keller* cases like *Gibson*
19 developed constitutional *Keller*-pure alternative procedures.

20 The State Bar's procedure already has withstood federal court scrutiny. In
21 2002, a State Bar member unsuccessfully challenged the State Bar's approach to
22 *Keller*, complaining in a federal lawsuit about the way in which the State Bar spends
23 mandatory dues on non-regulatory functions and its procedures for addressing
24 objections to its spending.

25 The State Bar successfully contended that because it had chosen to be "*Keller*
pure" and offered its members a constitutional procedure for objecting to the
expenditure of mandatory dues, the court did not need to consider whether *specific*
activities were improperly ideological. By following the procedure for objecting, the

1 State Bar had refunded the member 40 cents – the member's pro rata share of dues
2 corresponding to activities to which he objected. The court ultimately granted the
3 State Bar summary judgment.

4 In granting the State Bar summary judgment, U.S. District Judge Raner
5 Collins agreed that he need only consider whether the State Bar had in place
6 constitutionally appropriate procedures for members to challenge expenditures for
7 mandatory dues. He then turned to whether the procedures for challenging
8 expenditures were sufficient to protect a member's First Amendment interest,
9 summarizing the State Bar's procedure this way:

10 The Arizona Bar has developed the following procedure for members
11 to challenge the State Bar's spending on activities. The member must
12 first submit a written challenge to the Executive Director of the State
13 Bar which identifies the member, provides information on how to
14 contact the member, and specifies the challenged activity. Challenges
15 must be received by February 1 of the year immediately following the
16 calendar year in which the challenged activity occurred after the written
17 challenge is received, the Board (or its designee) is required to
18 determine the pro rata share of the member's dues used to fund the
19 challenged activity and to place the amount in an escrow account
20 pending determination of the merits of the challenge. The Board may
21 then decide whether to give a pro rata refund to the challenger or to
22 refer the challenge to arbitration. If the challenge proceeds to
23 arbitration, the challenger and the State Bar are to select, by mutual
24 agreement, an arbitrator to determine whether the challenged activity
25 complies with the limitations of the State Bar's bylaws. If the parties
cannot agree on an arbitrator, the President of the Bar is to apply to the
Chief U.S. District Court Judge for the District of Arizona for
appointment of an arbitrator. If the arbitrator finds that the challenged
activity violates the Bar's prohibition of spending on political or
ideological activities, the arbitrator is to determine the pro rata share of
dues to be refunded plus the actual interest rate earned in the escrow
account from the date of payment of those dues to the State Bar.

1 In Plaintiff's case, the State Bar determined that the plaintiffs challenge
2 to the expenditure of the Bar dues was meritless but it also determined
3 that, given the small amount in dispute the State Bar was not willing to
4 engage in costly arbitration. The Bar accordingly refunded Plaintiff
\$0.40, which it determined to be plaintiffs pro rata share of dues
corresponding to activities to which he objected.

5
6 May 20, 2003, order at 11-12. (A copy of Judge Collins' order is attached as Exhibit
7 A.)

8 The court ruled that (1) the State Bar may require a member to make a specific
9 identification of the objectionable activity and (2) that plaintiff's First Amendment
10 rights were not violated because "the State Bar is not required to refer plaintiffs
11 challenge to arbitration either by its own bylaws or by the relevant case law on the
12 State Bar's spending procedures. The State Bar has the option of refunding plaintiff
13 his dues plus interest, or referring the case to arbitration." Judge Collins determined
14 that the State Bar's refund of the plaintiff's prorated share of dues and also providing
the plaintiff with a copy of its budget summary was appropriate.

15 Petitioner's alleged request for an accounting of inactive fees and his general
16 objection to fees being used for politically motivated issues is not and was not an
17 appropriate *Keller* challenge. His request for an inactive dues accounting appears
18 totally unrelated to a *Keller* challenge. It was not a specific expenditure challenge as
19 required by the State Bar's adopted (and constitutional) process, but rather an
20 inarticulate request to learn how inactive fees are established. John Phelps, the State
21 Bar's executive director/CEO, more than adequately responded to that request by
22 explaining the Court's role in the dues process. (See page 7 of Petition). But, clearly,
23 Petitioner did not at any time challenge a specific expenditure. Mr. Phelps' reference
24 to the Rules of Professional Conduct was simply a reminder that Petitioner, who had
25 communicated often stridently, should act professionally and treat State Bar staff in

1 a civil manner. It was certainly not an effort to close the door on discussion nor
2 prevent Petitioner from making *Keller*-appropriate challenges.

3 In addition, in response to Petitioner's requests for information about lobbying
4 expenditures, the Bar's Chief Communications Officer, Rick DeBruhl, explicitly
5 provided Petitioner with the relevant information.

6 Mr. Phelps, Mr. DeBruhl and the rest of the State Bar staff are committed to
7 open and transparent communications with State Bar members.

8 **III. The dues structure approved by this Court ensures that the State**
9 **Bar protects the public and provides value to all members.**

10 Finally, the petition, in an apparent attempt to lower dues, questions not only
11 the value an inactive member receives for paying inactive dues but also why
12 members in general pay for "discretionary" costs.

13 The petition evidences a lack of understanding that the Bar's mandatory and
14 discretionary functions are all *Keller*-permissible activities, because they are related
15 to the State Bar's core purposes. While the petition complains that active members
16 receive additional benefits, he fails to disclose that inactive members also pay far
17 less in member fees. Although some benefits are not provided to inactive members
18 (such as the online-research tool Fastcase, because inactive members are not
19 authorized to practice law and thus should have no use for it), others (such as the
20 ethics hotline, because even inactive members are subject to the ethical rules) are
21 available. Both examples of discretionary functions are *Keller*-permissible
22 expenditures because they are directly related to the State Bar's core purposes.

23 In effect, the petition wants the Court to tell Arizona lawyers they do not need
24 to financially support programs that help them, their fellow lawyers or the legal
25 profession in general.

The State Bar, acting under this Court’s supervision, is committed to serving the public by enhancing the legal profession. In conjunction with other revenue, the State Bar only uses mandatory membership dues to support programs that meet its mission statement: to “serve[] the public and enhance[] the legal profession by promoting the competency, ethics and professionalism of its members and enhancing the administration of and access to justice.”

Petitioner's references to Nebraska and Michigan are red herrings. Although they are mandatory bars, they are different entities. And, although Nebraska has made significant changes to its mandatory bar dues structure, Arizona does not need to follow suit. Making changes in Nebraska was Nebraska's prerogative. Of the 34 integrated bars in this country, only Nebraska has chosen a different structure at this time. One size, however, does not fit all. And, in Michigan, change has been focused on establishing *Keller* review procedures, to bring its state bar more in alignment with states, like Arizona, that already have well-established and validated processes.

If the Court is inclined to give any credence to the “follow Michigan and Nebraska” argument, the State Bar suggests waiting until the court’s own task force on the State Bar – the “Task Force on the Review of the Role and Governance Structure of the State Bar of Arizona” – finishes its task.

Conclusion

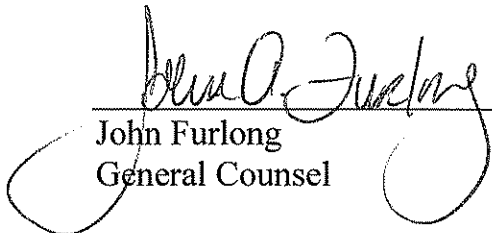
Petitioner's arguments do not justify dramatically revising Arizona's mandatory-bar dues structure and revamping Rule 32. In addition, the State Bar already complies with *Keller*.

Finally, another task force is unnecessary. Petitioner could have directed constructive comments and suggestions to the current task force on State Bar governance rather than use the Rule 28 rule-change process. Rule 28 is an

1 established process for the adoption, amendment and repeal of rules of procedure for
2 the courts of this state; it is not an appropriate tool for requesting a task force.

3 For all the reasons explained above, the State Bar respectfully requests that
4 the Court reject the petition.

5
6 RESPECTFULLY SUBMITTED this 4th day of May, 2015.

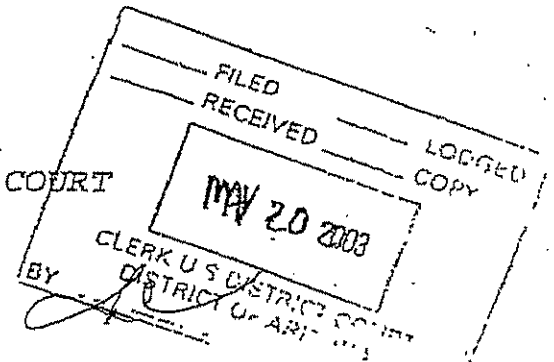
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11 John Furlong
12 General Counsel

13 Electronic copy filed with the
14 Clerk of the Arizona Supreme Court
15 this 10th day of May, 2015.

16 by: 
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Exhibit A

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA



Edmund D. Kahn,

vs.

State Bar of Arizona,

JUDGMENT IN A CIVIL CASE

No. CV 02-164-TUC-RCC

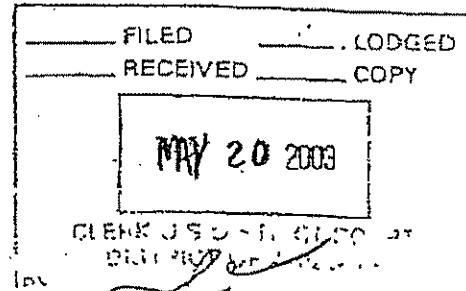
DECISION BY COURT. This action came on hearing before the Court. Argument has been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment having been GRANTED, judgment is hereby entered in favor of Defendant and against the Plaintiff. The Clerk is to enter judgment accordingly and CLOSE this case.

May 16, 2003
Date

RICHARD H. WERE
CLERK

Maureen Gorski
(By) Deputy Clerk,
Maureen Gorski



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EDMUND D. KAHN,

Plaintiff,

vs.

STATE BAR OF ARIZONA,

Defendant.

No. CV 02-164-TUC-RCC

ORDER

Pending before the Court is Defendant's November 26, 2002 Second Motion to Dismiss and Defendant's November 26, 2002 Motion for Summary Judgment. The Court heard oral argument on these motions on April 25, 2003. The motions are fully briefed and ready for decision. After consideration of the parties' claims, the Court will grant the motion to dismiss in part and deny the motion to dismiss in part and will grant the motion for summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is an attorney in the State of Arizona. On March 26, 2002, Plaintiff filed his complaint against Defendant State Bar of Arizona ("State Bar") alleging the requirements that attorneys wishing to practice in Arizona 1) join the State Bar of Arizona and 2) pay annual dues toward the support of the bar are violations of his First Amendment right to freedom of

1 association and Article XXV of the Arizona Constitution. Plaintiff further alleges that the
2 State Bar has failed to reform its non-regulatory activities in accordance with the United States
3 Supreme Court decision, *Keller v. State Bar of California*, 496 U.S. 1 (1990). Plaintiff filed
4 a Petition for Preliminary Injunction on May 9, 2002 which this Court denied on July 11,
5 2002. Defendant filed its first Motion to Dismiss on May 29, 2002. The Court dismissed
6 Plaintiff's claims relating to State Bar disciplinary proceedings then pending against Plaintiff
7 but determined that dismissal of Plaintiff's entire claim was not appropriate at that time as
8 Defendant's motion only addressed the state disciplinary proceedings. Defendant filed the
9 pending second motion to dismiss and a simultaneous motion for summary judgment on
10 November 26, 2002.

11 12 MOTION TO DISMISS

13 Defendant first claims that the Eleventh Amendment bars this Court from extending
14 jurisdiction over Plaintiff's claim for monetary damages based on the State Bar's alleged
15 violation of the U.S. Constitution. This is because the Eleventh Amendment prohibits an
16 individual from suing a state or state agency in federal court for retroactive relief or for
17 monetary damages against the state. Defendant asserts that the U.S. Supreme Court has
18 recognized the level of integration between the State Bar and the Arizona Supreme Court in the
19 following cases: *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and *Hoover v. Ronwin*,
20 466 U.S. 558 (1984). Defendant concedes that Plaintiff's claims for prospective relief may
21 be heard by this Court and addresses those claims in its motion for summary judgment.

22 Defendant further argues that the Eleventh Amendment bars the Court from hearing
23 Plaintiff's state constitution claims because the Eleventh Amendment prohibits claims against
24 a state by its own citizens based on alleged violations of state law. Because Plaintiff
25 challenges compulsory membership in the State Bar as a violation of the Arizona Constitution's
26 right to work provision, Defendant contends this Court is barred from hearing Plaintiff's state
27 law claims.

1 In the alternative, Defendant urges the Court to exercise its discretion to refuse to hear
2 Plaintiff's state law claims under its supplemental jurisdiction authority. Defendant asserts that
3 Plaintiff's Arizona Constitution claim presents a novel question of state law and that because
4 Plaintiff is challenging the existence of the State Bar, Plaintiff's state law claims predominate
5 over his federal claims.

6 Finally, Defendant argues that, should this court accept supplemental jurisdiction over
7 the state law claims, these claims should be dismissed under FED.R.Civ.P. 12(b)(6) because
8 the State Bar is not a labor organization within the meaning of Article XXV of the Arizona
9 Constitution.

10 Plaintiff responds by claiming that the Court can and should rule on his state
11 constitution claims because the Arizona Supreme Court will not impartially decide whether
12 it violated the Arizona Constitution by requiring attorneys to belong to and pay dues in support
13 of the State Bar. Plaintiff further argues the State Bar is a labor organization and as such is
14 subject to Article XXV of the Arizona Constitution.

15 Discussion

16 *Eleventh Amendment*

17 The Eleventh Amendment provides, "The Judicial power . . . shall not . . . extend to any
18 suit in law or equity . . . against one of the United States by Citizens of another State or by
19 Citizens or Subjects of any Foreign State." U.S. Const., Amend. XI. Courts have interpreted
20 the Eleventh Amendment as a grant of sovereign immunity to the states against suit in federal
21 court. Although the Eleventh Amendment does not expressly bar suits against a state by its
22 own citizens, it has been so interpreted: "An unconsenting State is immune from suits brought
23 in federal courts by her own citizens as well as by citizens of another state." *Pennhurst State*
24 *School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). In the absence of consent of the
25 state, the Eleventh Amendment bars a suit in which a state or one of its agencies or
26 departments is named as a defendant. *Id.*

27 However, suits against state officials to enjoin them from continuing to enforce
28 allegedly unconstitutional state laws are not deemed against the state, and hence are not barred

1 by the Eleventh Amendment. It is immaterial that the state is the real party in interest in these
2 cases. See *Ex Parte Young*, 209 U.S. 123, 166 (1908). The *Ex Parte Young* exception to the
3 Eleventh Amendment applies where enforcement of the state law would violate the U.S.
4 Constitution or federal statutes. See *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261,
5 281 (1997). The *Ex Parte Young* doctrine applies only to ongoing and continuous violations
6 of federal law; the exception does not authorize suits for retroactive money damages against
7 a state official for his or her acts. See *Edelman v. Jordan*, 478 U.S. 651, 666-667 (1974).
8 Relief under the *Ex Parte Young* exception is limited to prospective, injunctive relief. *Id.*

9 Pivotal to the Eleventh Amendment question in this case is whether the State Bar of
10 Arizona can be considered a state agency in the context of this suit. A state agency is not
11 immune from suit in federal court under the Eleventh Amendment if it is shown to be operating
12 independently of the state. See *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47
13 (1994) (port authority not entitled to Eleventh Amendment immunity where it was shown to
14 be financially self-sufficient, generating its own revenues and paying its own debts.) Courts
15 have considered the following factors in determining whether a state entity is protected by
16 Eleventh Amendment sovereign immunity: "(1) whether a money judgment would be satisfied
17 out of state funds, (2) whether the entity performs central governmental functions, (3) whether
18 the entity may sue or be sued, (4) whether the entity has power to take property in its own name
19 or only the name of the state, and (5) the corporate status of the entity." *ITSI TV Prods. v.*
20 *Agricultural Ass'ns*, 3 F.3d 1289, 1292 (9th Cir.1993).

21 "[T]he vulnerability of the State's purse [is] the most salient factor in Eleventh
22 Amendment determinations." *Hess*, 513 U.S. at 47. Arizona Supreme Court Rule 31
23 provides that the purpose of the State Bar of Arizona is to: advance the administration of
24 justice; aid the courts in carrying on the administration of justice, to provide for and
25 regulate the admission of persons seeking to engage in the practice of law, to provide for
26 the regulation and discipline of persons engaged in the practice of law; to foster and
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1 maintain on the part of practicing attorneys high ideals of integrity, learning, competence
2 and public service, and high standards of conduct; to provide a forum for the discussion of
3 subjects pertaining to the practice of law, the science of jurisprudence, and law reform; to
4 carry on a continuing program of legal research in technical fields of substantive law,
5 practice and procedure, and to make reports and recommendations thereon; and to
6 encourage practices that will advance and improve the honor and dignity of the legal
7 profession. Rule 31 also provides that the State Bar operates under the direction and
8 control of the Supreme Court; may be a non-profit corporation under Chapter 5 of Title 10
9 of the Arizona Revised Statutes; may sue and be sued; and may enter into contracts and
10 acquire, hold, encumber, dispose of and deal in and with real and personal property.
11

12 With respect to membership fees, Rule 31(c) (7) provides that the annual
13 membership fee for the State Bar shall be "composed of an amount for the operation of the
14 activities of the state bar and an amount for the funding of the Client Security Fund." Rule
15 31(c)(8) states, "All fees shall be paid into the treasury of the state bar and, when so paid,
16 shall become part of its funds, except that portion of the fees representing the amount for
17 the funding of the Client Security Fund shall be paid into the trust established for the
18 administration of the Clients Security Fund." The State Bar maintains its treasury separate
19 from that of the state.
20

21 There is also significant caselaw on whether a state bar is entitled to Eleventh
22 Amendment immunity. First, in *Bates v. State Bar of Arizona*, a case where attorneys
23 challenged the State Bar's disciplinary actions against them as a violation of their First
24 Amendment rights, the U.S. Supreme Court found that "the Arizona Supreme Court is the
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1 real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the
2 enforcement process." 433 U.S. 350, 361 (1977). In *Hoover v. Ronwin*, 466 U.S. 558, the
3 Supreme Court found that State Bar's Committee on Examinations and Admissions was an
4 extension of the Arizona Supreme Court and as such was not subject to the requirements of
5 the Sherman Act. Similarly, the Ninth Circuit held that a district court properly dismissed
6 the State Bar of Nevada from suit on Eleventh Amendment grounds because the state bar is
7 the investigative arm of the Supreme Court of Nevada, charged with investigating and
8 disciplining the legal profession of the state. See *O'Connor v. State of Nevada*, 686 F.2d
9 749 (9th Cir. 1982).

12 There is, however, a significant difference between the above cases and this case,
13 Namely, those cases generally challenged either the state bar's disciplinary function or its
14 function in administering the bar exam and admitting new attorneys. In these capacities, the
15 state bar clearly acts as an arm of the Arizona Supreme Court in regulating the practice of
16 law. In this case, Plaintiff challenges the way in which the state bar spends mandatory dues
17 on non-regulatory functions and the bar's procedures for addressing objections to its
18 spending. Because this suit challenges the bar's spending on non-regulatory programs, the
19 link between the state bar and the Arizona Supreme Court is more tenuous. Moreover, the
20 state bar maintains its own treasury and any award of damages would come from the state
21 bar's funds rather than the state treasury--this is a key factor in determining whether an
22 entity is a state agency for Eleventh Amendment purposes. Finally, the bar is a non-profit
23 corporation, may enter into contracts, and may hold property in its own name. These are all
24 factors act against finding the state bar a state agency for Eleventh Amendment purposes.

1 Consequently, the Court finds that in the context of the pending case, the State Bar of
2 Arizona is not a state agency such that it receives the benefit of Eleventh Amendment
3 immunity. The Court will deny the motion to dismiss as it relates to Plaintiff's federal
4 claims for retroactive, monetary relief.

6 *State Law Claims*

7 As long as a Plaintiff's complaint sets forth a claim "arising under" federal law, the
8 district court may adjudicate state law claims that are transactionally related to the federal
9 claim. See U.S.C. §1367(a). Supplemental jurisdiction is proper where the federal and
10 state claims "form part of the same case or controversy under Article III of the United
11 States Constitution." *Id.* The Court may decline to exercise supplemental jurisdiction
12 where any of the following factors exist: 1) the state law claim involves a novel or complex
13 issue of state law; 2) the state law claim substantially predominates over the claim on which
14 the court's original jurisdiction is based; 3) the district court has dismissed the claims on
15 which its original jurisdiction was based; 4) in exceptional circumstances, there are other
16 compelling reasons for declining jurisdiction. 28 U.S.C. §1367(c)(1)-(4).

17 It appears that neither the Arizona Supreme Court or the Arizona Court of Appeals
18 has addressed whether mandatory bar membership for practicing attorneys is a violation of
19 Article XXV of the Arizona Constitution. As such, the question is a novel issue of state law
20 and the Court will decline to extend its jurisdiction to this claim. The Court will grant
21 Defendant's motion to dismiss as it relates to Plaintiff's state law claims.

1 MOTION FOR SUMMARY JUDGMENT

2 Defendant's motion for summary judgment raises the following issues: 1) whether
3 mandatory bar membership is a violation of attorneys' First Amendment freedom of
4 association rights and 2) whether the Arizona State Bar's procedures for addressing
5 disputes to its spending practices are in compliance with the requirements set out by the
6 U.S. Supreme Court in *Keller v. State Bar of California*, 496 U.S. 1 (1990).
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8 The Court in *Keller* ruled that mandatory dues may not be used for political or
9 ideological purposes unrelated to the core function of the bar and the bar must provide
10 procedural safeguards in order to prevent such use of mandatory dues. *Id.* In order to
11 comply with *Keller*, the State Bar asserts that it has chosen to be "*Keller-pure*," meaning it
12 only spends dues on activities directly related to its core purpose. The State Bar argues that
13 as long as it offers its members a constitutional procedure for objecting to the expenditure
14 of mandatory dues, the Court need not consider whether specific activities of the State Bar
15 are improperly ideological.
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18 As part of its "*Keller-pure*" policy, the State Bar has adopted bylaws which prohibit it
19 from using membership dues to fund activities of a political or ideological nature not
20 reasonably related to regulation of attorneys, improvement of the functioning of the justice
21 system, availability of legal services to the public, regulation of attorney trust accounts,
22 education and ethics of the legal profession and other activities authorized by law. State Bar
23 of Arizona Bylaws §13.02. Defendant argues that its procedures for addressing member
24 challenges to spending, in combination with its "*Keller-pure*" policy, meet the constitutional
25 requirements set forth by the U.S. Supreme Court. Specifically, Defendant states that it
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1 gives its members adequate information to assess the use of members' mandatory dues by
2 publishing the minutes from all Board of Governors' meetings, the annual budget of
3 expenditures, and comprehensive legislative reports in the Arizona Attorney magazine.
4 Defendant also alleges that it provides its members reasonable opportunity to challenge its
5 use of mandatory bar dues before an impartial decision maker.
6

7 Plaintiff argues that the State Bar is required to notify its members in advance of
8 any activities not related to the State Bar's core purpose. Defendant in this case does not
9 provide adequate information, Plaintiff contends, because it publishes information about its
10 spending only after the spending has occurred. Further, Plaintiff asserts that the State Bar's
11 procedures for addressing member challenges to its spending are inadequate because it did
12 not refer Plaintiff's challenge to an independent arbitrator and did not provide Plaintiff with
13 an explanation of how it determined the pro-rata amount of dues refunded to him as a result
14 of his objection to some of the State Bar's spending activity. Finally, Plaintiff claims that
15 the State Bar may not require a member to file specific objections to spending activities
16 and asserts that the State Bar is not "Keller-pure" because it spends, by Plaintiff's
17 calculation, 65% of its total budget on non-core functions.
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19 Discussion
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21 In *Keller v. State Bar of California*, the U.S. Supreme Court considered whether
22 members of the State Bar of California could be compelled to pay dues in support of
23 political or ideological causes to which they do not subscribe. The Court held that:
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25 the compelled association and integrated bar are justified by the
26 State's interest in regulating the legal profession and improving the
27 quality of legal services. The State Bar may therefore constitutionally
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1 fund activities germane to those goals out of the mandatory dues of all
2 members. It may not, however, in such matters fund activities of an
3 ideological nature which fall outside of those areas of activity.

4 *Keller*, 496 U.S. at 13-14. "The guiding standard must be whether the challenged
5 expenditures are necessarily or reasonably incurred for the purpose of regulating the
6 legal profession or improving the quality of the legal service available to the people
7 of the state." *Id.* at 14 (quotation and internal citations omitted).

8
9 Although the Court did not explicitly specify how a bar association must act
10 to protect the interests of dissenting members when apportioning its mandatory
11 dues, the Court noted with favor the procedure outlined in *Teachers v. Hudson*, 475
12 U.S. 292 (1986), for the collection of mandatory fees from non union members.
13 Specifically, the association should provide an "adequate explanation of the basis for
14 the fee, a reasonably prompt opportunity to challenge the amount of the fee before
15 an impartial decision maker, and an escrow for the amounts reasonably in dispute
16 while such challenges are pending." *Keller*, 496 U.S. at 16.

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19 *Keller* does not entirely prohibit a state bar from engaging in political or
20 ideological activity. Rather, it only prohibits the bar from spending members'
21 mandatory dues on political or ideological activities not related to the core purpose
22 of the bar. Consequently, the Court agrees that it need only consider whether the
23 State Bar has in place constitutionally appropriate procedures for members to
24 challenge expenditures of mandatory dues.

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26 Central to Plaintiff's complaint about how the State Bar spends member dues
27 is the fact that the State Bar does not publish information about its spending until
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1 after the expenditures have occurred. Plaintiff claims this violates the standards
2 outlined in *Keller*. However, *Keller* only requires a state bar to publish information
3 about political or ideological spending not related to the bar's core purpose.
4 Defendant has indicated in this case that in order to comply with *Keller*, it has
5 chosen to spend money only on activities related to its core purpose. Consequently,
6 the Court cannot compel the State Bar to publish information on the State Bar's
7 political and ideological activities when, under the State Bar's evaluation, it does
8 spend member dues on those activities. The question then becomes whether the
9 State Bar has in place procedures for challenging its expenditures sufficient to
10 protect a member's First Amendment interests.

11 The Arizona bar has developed the following procedure for members to
12 challenge the State Bar's spending on activities. The member must first submit a
13 written challenge to the Executive Director of the State Bar which identifies the
14 member, provides information on how to contact the member, and specifies the
15 challenged activity. Challenges must be received by Feb. 1 of the year immediately
16 following the calendar year in which the challenged activity occurred. After the
17 written challenge is received, the Board (or its designee) is required to determine
18 the pro rata share of the member's dues used to fund the challenged activity and to
19 place the amount in an escrow account pending determination of the merits of the
20 challenge. The Board may then decide whether to give a pro rata refund to the
21 challenger or to refer the challenge to arbitration. If the challenge proceeds to
22 arbitration, the challenger and the state bar are to select, by mutual agreement, an
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1 arbitrator to determine whether the challenged activity complies with the limitations
2 of the State Bar's bylaws. If the parties cannot agree on an arbitrator, the President
3 of the Bar is to apply to the Chief U.S. District Court Judge for the District of
4 Arizona for appointment of an arbitrator. If the arbitrator finds that the challenged
5 activity violates the bar's prohibition of spending on political or ideological
6 activities, the arbitrator is to determine the pro rata share of dues to be refunded
7 plus the actual interest rate earned in the escrow account from the date of payment
8 of those dues to the state bar.
9

11 In Plaintiff's case, the state bar determined that Plaintiff's challenge to
12 expenditure of bar dues was meritless but also determined that, given the small
13 amount in dispute, the State Bar was not willing to engage in costly arbitration. The
14 bar accordingly refunded Plaintiff \$0.40, which it determined to be Plaintiff's pro
15 rata share of dues corresponding to activities to which he objected.
16

17 Plaintiff argues that the State Bar may not require a member to make a
18 specific, written objection to the State Bar's spending procedures. *See Schneider v.*
19 *Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990). The court in
20 *Colegio* found that a bar association cannot require a member to make a specific
21 objection because dissenters should be able to "trigger refunds by means of general
22 objections so that they need not make public their views on specific issues." *Id.* at
23 635. However, the court went on to state, "Dissenters also may not be required to
24 explain the basis for particular objections beyond detailing why they view a disputed
25 activity to be outside the Colegio's core functions." *Id.* Arizona's bylaws require a
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1 member to state which activity they are objecting to but do not require an
2 explanation of why the member finds that activity objectionable. Arizona's bylaws
3 are not outside of the parameters outlined in *Colegio*. Specifically, a member of
4 the Arizona Bar must identify the challenged activity and describe why he or she
5 finds the activity outside of the State Bar's spending authority. The bylaws do not
6 require a member to make his political or ideological views publicly known.
7
8 Accordingly, there is no First Amendment violation in this portion of the challenge
9 procedures.
10

11 Plaintiff also contends that the State Bar's challenge procedures violate his
12 First Amendment rights because his complaint was not referred to arbitration and
13 because the State Bar did not explain to Plaintiff how it determined his pro rata
14 share of dues. The State Bar is not required to refer Plaintiff's challenge to
15 arbitration either by its own bylaws or by the relevant caselaw on state bar spending
16 procedures. The State Bar has the option of refunding Plaintiff his dues, plus
17 interest, or referring the case to arbitration. Bylaw §13.03; *Gibson v. Florida Bar*,
18 906 F.2d 624, 632 (11th Cir. 1990). In Plaintiff's case, the State Bar refunded
19 Plaintiff's pro rata share of dues. Moreover, the State Bar provided Plaintiff with a
20 copy of its budget summary at Plaintiff's request and informed Plaintiff that the
21 entire budget was available for his review at the State Bar offices. Plaintiff was also
22 informed that if he disputed the amount he believed he was entitled to have refunded,
23 his dispute would be directed to the State Bar's accounting department for further
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1 review. This information was sufficient to allow Plaintiff to evaluate the State Bar's
2 response to his spending challenge.

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4 Because the Court finds that the State Bar's procedures for addressing
5 member challenges to its spending is in substantial compliance with *Keller*, the
6 Court will grant Defendant's motion for summary judgment.

7 Accordingly, IT IS ORDERED that Defendant's November 26, 2002 Second
8 Motion to Dismiss [Doc. 32] is DENIED with respect to Plaintiff's federal law
9 claims and GRANTED with respect to Plaintiff's state law claims.

10 IT IS FURTHER ORDERED that Defendant's November 26, 2002 Motion
11 for Summary Judgment [Doc. 29] is GRANTED. The Clerk of the Court is directed
12 to close the case and enter judgment.
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17 DATED this 16th day of May, 2003.
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22 Raner C. Collins
23 United States District Judge
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